Commission finds that the record in this case shows that SBT has both the ability and incentive to operate anti-competitively (and in fact has operated anti-competitively) in the ES market, including the VMS market. The Commission believes SBT will continue to do so unless effective, practical controls are set in place to prevent or deter such activity. Indeed, the Commission finds that SBT's current presence in the VMS market without such controls is not promoting the policy desired by the Commission. The Commission therefore will order that SBT's trial authority to offer MemoryCall℠ service be placed on hold until the Commission can design and implement the controls it believes necessary to protect the market and the State's economy from SBT monopoly behavior that threatens the existence of an efficient, competitive VMS market. Specifically, the following actions will be ordered.

1. The Commission will temporarily freeze SBT's trial offering of MemoryCall℠ service. The freeze means that SBT's provision of MemoryCall℠ service is temporarily restricted to those specific MemoryCall℠ customers who have actually subscribed to MemoryCall℠ service on or before the effective date of the Commission Order in this case.

2. The Commission states that the purpose of the temporary freeze is to halt SBT's anticompetitive behavior pending filing by Southern Bell of a complete cost of service study for MemoryCall℠ service, including all workpapers thereto, and pending Commission design and implementation of appropriate regulatory controls to prevent and/or deter monopoly abuse and to insure that SBT's entry

into the VMS market has the effect of assisting instead of retarding development of an efficient, competitive VMS market. The temporary freeze will remain in place no longer than necessary to achieve these ends. After that, SBT's trial offer of MemoryCall℠ service will resume.

3. The Commission undertakes the following investigations/actions in order to develop the appropriate regulatory controls:

a. Identification of the actions necessary to insure the elimination of all network access problems that have kept or it is reasonably believed may keep VMS competitors from having comparably efficient interconnection to the local system. This includes:

1. Solving the co-location problem;

2. Solving the 1AESS switch upgrade and replacement problem;

3. Developing system architecture besides DID architecture that provides the opportunity to provide VMS.

b. Establishing CPNI rules and procedures to deal with CPNI problems and their resolution on an ongoing basis;

c. Designing regulatory controls to eliminate improper marketing practices. This would include controls that:

1. Preclude solicitation of TAS Bureau customers who call SBT to order Call Forwarding and other custom calling features;

2. Preclude solicitation and sales of MemoryCall℠ service by anyone other than a specially designated sales force;

3. Require SBT to establish a separate marketing organization for the marketing of MemoryCall℠, complete with appropriate cost accounting controls and other organizational requirements

designed to insure that all the activities associated with marketing MemoryCall℠ and their costs are provided and accounted for separate from the operation of any other part of SBT's marketing arm, or require SBT to provide MemoryCall℠ through a separate subsidiary;[25]

4. Equalize access by all VMS competitors to SBT's monopoly billing system for use in billing for VMS services;

5. Equalize access by all VMS competitors to SBT's monopoly billing system for use in promoting any VMS service by any means.

d. Establishing the proper price for MemoryCall℠ service by means of:

1. Performing a complete review of all relevant cost data and making an independent assessment of the true cost of MemoryCall℠ service;

2. Assessing whether and how SBT's provision of MemoryCall℠ service benefits from the following aspects of SBT's monopoly position, and if so, whether the price of MemoryCall℠ should so reflect:

a) Association with the BellSouth and/or the Southern Bell logo and name.

4. The temporary freeze shall be reexamined by the Commission once the matters listed above have been concluded so that the Commission may determine to its satisfaction that SBT can be set free in the VMS market to compete under the regulatory framework referanced below (paragraph 5) without undue risk of SBT abusing its monopoly position.

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[25] See, Transcript, p. 252, l. 7 to l. 15, Testimony of ATC witness Mr. Sulmonetti, establishing that ATC does not market its voice mail service as a package with its interexchange services, but rather has established a separate marketing organization for its voice mail service.

5. The Commission adopts the regulatory framework for MemoryCall℠ that is described in detail in the Staff's prefiled testimony in this case, which is geared to regulating SBT's presence in the VMS market and other ES markets in a way that promotes development of those markets to their efficient, competitive limits.

VI.

PREEMPTION ISSUES

A. FCC Preemption

1. The Rule of Law

The scope of the FCC's jurisdiction is defined by the Communications Act of 1934.[26] Section 152(b)(1) of the Communications Act contains Congress' enactment of an express jurisdictional bar to the FCC's authority to act in any manner in the arena of intrastate telecommunications services.[27] The jurisdictional bar contained in the Communications Act has been ruled by the Unites States Supreme Court to preclude the FCC from preempting state regulation of intrastate telecommunications

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[26] See, 47 U.S.C. § 151, et seq., hereafter "the Communications Act."

[27] Section 152(b)(1) states in pertinent part as follows:

> . . . nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

services except in very narrow, limited circumstances. Those circumstances arise under what is called the impossibility exception. See, Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 359 (1986); People of the State of California v. Federal Communications Commission, 905 F.2d 1217 (9th Cir. 1990) (hereafter referred to as "California v. FCC" and the California v. FCC court as "the Court").

The impossibility exception is triggered only when the state regulator's exercise of its authority to regulate intrastate telecommunications services negates the exercise by the FCC of its own valid authority over interstate telecommunications services. Moreover, even where such conditions are proven by the FCC, the FCC's preemption order is upheld only where the FCC carries it burden of showing that every aspect of its preemption order is narrowly tailored to preempt only the state regulation or portion thereof that necessarily thwarts or impedes the FCC's valid regulation of interstate telecommunications services. That showing must be made with specificity. Id.

2. The Court's Application of the Rule of Law to Computer Inquiry III

In Computer Inquiry III, the FCC attempted to preempt virtually all manner of state regulation of intrastate enhanced services. The FCC specifically sought to preempt the states from taking three broad types of actions:

1. Tariffing intrastate enhanced services;

2. Requiring structural separation between intrastate basic services and intrastate enhanced services;

3. Requiring non-structural safeguards inconsistent with or more stringent than the FCC's system of non-structural safeguards.[28]

Each attempted preemptive action was struck down by the Court. In doing so, the Court made several points particularly relevant to this Commission's efforts to determine whether and how to craft a regulatory scheme to regulate SBT's provision of MemoryCall℠.

The Court rejected the FCC's attempt to impose any restrictions on a state's effort to tariff intrastate enhanced services. It appears that the Court believes that the impossibility exception cannot provide a valid basis upon which the FCC can preempt state tariffing. See, California v. FCC, p. 1242. Indeed, it appears that the FCC itself did not even attempt to defend this particular preemptive action under an impossibility exception approach. Id., f.n. 38.

The Court also struck the FCC's attempt to preempt all state regulation imposing structural separation requirements. The FCC attempted to preempt this type of state action on the theory that any state requirement to separate intrastate enhanced and basic services necessarily forces a BOC to separate their interstate basic and enhanced services, due to the fact that intrastate and interstate components of enhanced services are structurally

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[28]The FCC's system of non-structural safeguards amounts to basically three items: (1) application of certain ONA requirements; (2) application of certain CEI requirements; and (3) application of the Joint Cost Rules and a carrier-specific Cost Allocation Manual.

inseverable. Id., pp. 1243-44. The Court struck this aspect of the FCC preemption order because the FCC failed to carry its burden of demonstrating that all state-imposed separation requirements would necessarily negate the FCC policy of permitting the structural integration of basic and enhanced interstate services.

In the Court's view, the FCC's preemption order neglected to face the possibility that some enhanced services may be offered on a purely intrastate basis. In fact, the example used to illustrate this point was voice mail services, said to be a service offered to discreet locales within a state and therefore a purely intrastate enhanced service. Thus, the FCC's attempt to preempt all state structural separation requirements was struck because the FCC did not carry its burden of showing that

> the structural separation of such purely *intra*state enhanced services from basic telephone service would interfere in any way with a carrier's ability to provide *inter*state enhanced services (or enhanced services with mixed intra- and interstate components) on an integrated basis.

Id., p. 1244.

In addition, the Court rejected the FCC's inseverability contention because that contention assumed that state structural separation regulations necessarily require separation of physical facilities. The Court noted that

> [s]tate regulations might require only that carriers establish separate corporate *organizations* for providing intrastate basic telephone and enhanced services, while allowing the same facilities to be used for both types of services. The Commission has failed to explain why requiring communications

> carriers to offer *intra*-state enhanced services through a separate corporation would frustrate the Commission's goal of giving communications carriers the freedom to choose whether to integrate or separate their *inter*-state operations.

Id. The Court ruled that the narrow impossibility exception is not met where the FCC merely shows that some possible state structural separation requirements would negate the FCC's policy against a separate subsidiary requirement for the provision of interstate enhanced services.[29]

B. Federal Court Preemption.

Section III.A.1 herein describes the MFJ entered by the antitrust court and the line of business restrictions placed on the BOCs pursuant to the MFJ. Section III.A.2 herein further describes the line of business restrictions as they have been subsequently modified by the antitrust court. In particular, the waiver contained in the VMS Waiver Order as it relates to information services transmission is discussed, because that is the authority

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[29]However, the Court did acknowledge the possibility that the FCC could preempt some forms of state structural separation requirements. In particular, the Court noted that:

> [t]he Commission has made a plausible argument that *some* forms of state structural separation requirements would negate its policy of permitting the integration of basic and enhanced services offered on an interstate basis. For example, a state-imposed requirement that carriers use separate physical facilities for all basic telephone and enhanced services offered on an intrastate basis would almost certainly force carriers to separate their interstate services as well.

Id.

pursuant to which SBT now offers MemoryCall℠ without contravening the MFJ Decree.

The MFJ preempts state regulatory action to the extent that such action bars execution of the MFJ Decree. The MFJ Decree includes, of course the subsequent waiver of the information services transmission restriction. In keeping with the general rule of federal preemption under the Supremacy Clause of the United States Constitution, the antitrust court recognized that "a judicial remedy may infringe upon state law only to the extent necessary effectively to protect the federal interest." MFJ, p. 160 (citations omitted.)

C. Effects of Preemption Issues on the Commission's Actions

As discussed above, the FCC's ability to preempt state regulation of intrastate service is narrowly circumscribed and the antitrust court only bars state regulation that directly conflicts with the goals of the MFJ. In that context, the Commission's action here falls well within the scope of its authority and is not preempted by either the FCC or the antitrust court.

The Commission takes its cue from the Ninth Circuit's analysis in California v. FCC. The Commission therefore elects to stay clear of ordering SBT to separate its physical facilities that are used to provide mixed enhanced services (i.e., that have both an intrastate and interstate component) into separate subsidiaries.

However, the Commission believes that MemoryCall℠ is a purely intrastate telecommunications service. This view is supported by both the record (see, for instance, Testimony of Burgess and Madan,

Transcript, pp. 140 to 145) and the Ninth Circuit's analysis. California v. FCC, 905 F.2d at 1244. Therefore, under the analysis in California v. FCC the Commission might order a fully separate subsidiary requirement for SBT's provision of MemoryCall℠. However, because we wish to take the least intrusive measure first, a separate marketing organization within SBT may be appropriate at this time.[30] In order to gain maximum protection, the separate marketing organization requirement is intended to insure that the marketing organization that promotes MemoryCall℠ be very separate from the rest of SBT's marketing activities. At the same time, the Commission stops short of requiring duplication of the physical facilities (i.e., the local network facilities) necessary to provide MemoryCall℠ service.[31]

Similarly, the other actions taken by the Commission in this Order are not contrary to the preemption boundaries established by the Ninth Circuit in California v. FCC. Treating the revenues, expenses and investment of MemoryCall℠ above the line is consistent with both the ruling in California v. FCC and the FCC's own

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[30]As discussed in Part V, the Commission will consider whether the separate marketing organization will take the form of a separate subsidiary as part of its further proceedings in this matter. See, page 50, supra.

[31]SBT's preemption claims rest, in large part, on the assumption that the FCC, acting on the remand of California v. FCC, will again attempt to preempt state regulatory requirements like those imposed here, but this time avoid propagating overbroad preemption claims that again must be struck by the federal courts. Leaving the speculative nature of that assumption aside, the Commission's actions here are clearly within the sphere of exclusive state action contemplated by California v. FCC, the controlling case in this matter.

arguments in that case. See, California v. FCC, p. 1242 and f.n. 38 therein. Developing and implementing appropriate regulatory controls for CPNI, CEI and the marketing aspects of SBT's provision of MemoryCall™ is certainly not inconsistent with the FCC's approach to its regulation of interstate ES. Indeed, the FCC has devoted substantial effort to developing the regulatory controls it believes necessary to properly regulate interstate ES. The Commission is merely doing the same on an intrastate basis.

The Commission's state regulatory policy and the actions taken herein to achieve that policy also are consistent with the MFJ Decree and VMS Waiver Order. The regulation of MemoryCall™ simply does not affect the "federal interest" the MFJ court protects.

First, the MFJ explicitly recognizes the role of state regulation. While the VMS Waiver Order permits BOCs to enter the VMS market, it waives only the provisions of the MFJ itself that forbade entry and there is no language in the VMS Waiver Order that suggests preemption of normal state regulation. This is consistent with the original MFJ which, as noted above, preempted state regulation inconsistent with the MFJ's prohibitions, not state regulation that coveres permitted activities. See, Part VI.B, supra.

Second, the type of regulatory controls sought to be developed and deployed by the Commission are consistent with the VMS Waiver Order. The Commission's Order seeks to develop controls that will insure the development of an efficient competitive VMS market free from monopoly abuse. The antitrust court's overall goal is

similar. In performing its cost benefit analysis in favor of allowing BOC entry into the VMS market, the antitrust court decided in favor of BOC entry in part due to the absence of specific, concrete proof of anticompetitive behavior of the BOCs in the VMS market. See, VMS Waiver Order, pp. 21-22, and f.n. 9 of this Order. However, that is precisely the proof adduced in this case. See, Part III.C, supra.

Thus, based on both the original MFJ and the VMS Waiver Order, it is evident the antitrust court does not intend its VMS Waiver Order to preempt state regulation where, as here, evidence is presented giving concrete substance to the contention that a BOC has the opportunity and incentive to behave and, indeed, has behaved anticompetitively in the VMS market. Preemption by the antitrust court is extremely unlikely in the circumstances presented here. Moreover, the freeze of SBT's expansion into the VMS market is only temporary and will last no longer than the time necessary for the Commission to define and deploy appropriate regulatory controls to prevent monopoly abuse. In the Commission's view, such an order is not inconsistent with the information services line of business restriction contained in either the MFJ Decree or the VMS Waiver Order.

VII.

SBT'S EQUAL PROTECTION CLAIM

On April 15, 1991, Southern Bell Telephone and Telegraph Company ("SBT") filed its "Motion to Expand the Scope of the Docket

and Reschedule the Hearings" (hereafter, "Motion") in this case. The Motion raises an equal protection claim. Specifically, SBT asserts that regulation of its provision of MemoryCall® service without regulation of all other providers of competing services would result in "unfair discrimination against [SBT] . . . in violation of [SBT's] rights to equal protection of the law." Motion, p. 3.

SBT's equal protection claim is without merit. The short answer to SBT's equal protection challenge is: (1) because no one else is similarly situated to SBT, equal protection is not an issue; (2) even if there were others similarly situated, the Commission's decision to regulate SBT's provision of MemoryCall® meets the rational basis test that is applied where economic regulation is challenged on equal protection grounds; and (3) it is not a violation of equal protection where the Commission identifies one portion of a problem, i.e., SBT's opportunity and incentive to behave anticompetitively, as opposed to other local exchange companies' similar opportunity and incentive (if such exists), and then attacks the SBT portion of the problem first.

A. The Equal Protection Standard To Be Applied In This Case

The law with respect to equal protection of economic interests is well-established. The Equal Protection Clause of the United States Constitution "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 1055 S.Ct. 3249, 87

L.Ed. 2d 313, 320 (1985).[32] The Equal Protection Clause of the United States Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124, 1128 (1939). Thus, where two classes are sought to be required to be treated identically, but are found to be different in fact or opinion, disparate treatment of them does not represent an equal protection violation. Tirolerland v. Lake Placid 1980 Olympic Games, 592 F.Supp. 304, 319 (N.D.N.Y. 1984).

Even if two classes are similarly situated, they may be disparately treated if the treatment meets a rational basis test. A two step analysis occurs under the rational basis test: (1) Does the challenged action have a legitimate purpose; and, if so, (2) does the classification employed promote that purpose? See, Schweiker v. Wilson, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed. 2d 186, 197-198 (1981) ("Thus, the pertinent inquiry [under the rational basis test] is whether the classification employed . . . advances legitimate legislative goals in a rational fashion.") (Bracketed material supplied); Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed. 2d 171, 176 (1979).

There need not be a tight fitting relationship between the purpose and result. See, Jackson Water Works v. Public Utilities

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[32] SBT does not state whether it bases its equal protection claim on the Federal or State Constitution. However, the Eleventh Circuit Court of Appeals has recognized that under the Georgia Constitution, equal protection analysis applied to economic regulation turns on a rational basis standard aligned with federal equal protection analysis. See, Silverstein v. Gwinnett Hospital Authority, 861 F.2d 1560, 1565-66 (1988).

Comm., 793 F.2d 1090, 1094 (9th Cir. 1986). Moreover, there is a presumption of constitutionality under equal protection analysis if the local economic regulation

> is rationally related to a legitimate state interest. . . . Rational basis for an economic regulation is established easily and accorded minimal scrutiny. . . . In local economic regulation, wide latitude is given to the governmental entity and only a "wholly arbitrary act" overruns equal protection rational basis.

Silverstein v. Gwinnett Hospital Authority, 861 F.2d 1560, 1564 (11th Cir. 1988) (citations omitted). See also, Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 669 (11th Cir. 1984).

In applying the rational basis standard to test local economic regulation for equal protection flaws, it has been held that a "distinction [that] reflects the reality of the marketplace [is] therefore . . . not fundamentally irrational." Asociasion de Compositores v. Copyright Royalty Tribunal, 851 F.2d 39, 42-43 (2nd Cir. 1988).

The wide latitude given to states to regulate their local economies under their police powers extends to giving leeway to determine the order and timing of how it will attack a perceived problem. The United States Supreme Court, in New Orleans v. Duke, 472 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed 2d 511, 517 (1976), concluded that

> [l]egislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Accord, Minn. Ass'n of Health Care v. Minn. Dept. of Public Welfare, 742 F.2d 442, 448 (8th Cir. 1984) ("Consistent with equal protection principles, a legislature may deal with a problem one step at a time, addressing that part of the problem which seems most serious . . . or it may select but one phase of a field of business activity for regulation while neglecting the others.") (Citations omitted).

Equal protection under a rational basis test does not require that the classifications chosen by government to attack a perceived problem be perfect, mathematically precise or guaranteed not to result in any inequality.

> The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
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> . . .
>
> . . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.

Dandridge v. Williams, 397 U.S. 471, 485-486, 90 S.Ct. 1153, 25 L.Ed.2d 491, 502-503 (1970). (Citations and some material omitted).

B. Application of Law to the Facts

In the Commission's view, the facts clearly show that no one else is similarly situated to SBT. To begin with, the universe of those who could possibly be similarly situated to SBT is small. It is limited to local exchange companies, for only such entities have

even the potential opportunity and incentive to use their monopoly control over the local telephone network to defeat competition in the ES market. However, three circumstances distinguish SBT from all other Georgia local exchange companies: (1) only SBT has been adjudged by the antitrust court and the FCC to actually have the opportunity and incentive to behave anticompetitively in the ES market (See, Part III.A. and B.); (2) only SBT has been the subject of complaints to that effect with regard to its current actual behavior in the Georgia VMS market; and (3) only SBT's opportunity and incentive for anticompetitive behavior and actual anticompetitive behavior has been factually proven to the Commission.

The decision to control SBT's current presence in the ES market is a matter of the Commission's economic regulation of a monopoly telephone utility subject to its jurisdiction and authority, for the purpose of protecting competition in the ES market and protecting the economic interests of the State. Even if there were others similarly situated to SBT, the decision to control SBT's presence in the ES market, arguably reflecting a distinction between SBT and other local exchange companies, is a distinction that reflects the reality of the marketplace. While there are 36 local exchange companies in Georgia, SBT dominates the local exchange arena, controlling some 80% of all the local access lines in Georgia. The reality is that SBT's name recognition and market presence make it the central local exchange company player with respect to the fledgling ES market. The Commission's decision

to control SBT's presence in the ES market in order to promote development of a completely competitive ES market is a legitimate State regulatory goal. Focusing on SBT first, and employing the means described in this order to prevent and deter anticompetitive behavior, are steps rationally related to that legitimate goal. Certainly, selecting SBT for initial investigation and action is rationally related to that goal.

Equal protection does not require the Commission to investigate and control all local exchange companies (regarding anticompetitive behavior in the ES market) simultaneously. Consistent with equal protection principles, the Commission may attack one aspect of this problem at a time. SBT has not shown, and indeed could not show, that the Commission will not investigate and control other alleged local exchange companies' anticompetitive behavior in the ES market where it is brought to the Commission's attention as has SBT's practice with regard to MemoryCall℠ service.

VIII.

FINDINGS AND CONCLUSIONS OF FACT, LAW AND REGULATORY POLICY

Based upon the entire record in this case, including but not limited to the specific matters recited in this Order, the Commission makes the following findings and conclusions of fact, law and regulatory policy.

1.

The Commission finds and concludes that MemoryCall℠ is an intrastate telecommunications service over which the Commission may

exercise its regulatory authority. See, Section II, incorporated herein by reference.

2.

The Commission finds and concludes, by virtue of taking administrative notice of the relevant federal court decisions in the AT&T divestiture case, that since 1982 the United States District Court for the District of Columbia has continually found, in the context of applying the federal antitrust laws and in the context of exercising its responsibility to weigh public benefit and harm under the Tunney Act, that:

a. The BOCs possess monopoly control over local telephone service;

b. BOC monopoly control over local telephone service gives the BOCs the opportunity and incentive to impede competition;

c. Historically, BOC opportunity and incentive to impede competition through its monopoly control of local telephone systems has been manifested by such actions as (1) discriminating against competitors by denying, delaying or otherwise impeding access to the local network bottleneck, (2) cross-subsidizing competitive services with monopoly service revenues and/or improperly charging expenses and investment of competitive services to monopoly ratepayers and (3) exploiting marketing advantages stemming from the BOCs' local exchange monopoly position.

See, Section III.A, incorporated herein by reference.

3.

The Commission finds and concludes, by virtue of taking administrative notice, that the Federal Communications Commission ("FCC") in December, 1983 and in June, 1984 found that, in order to insure that BOC provision of enhanced services will not lead to unreasonable rates because of improper cost shifting or diminish competition in the provision of enhanced services because of other anti-competitive practices, BOC provision of enhanced services must be performed through a separate subsidiary. The FCC found that structural separation would assist control of the BOCs' ability to cross-subsidize competitive offerings and the BOCs' ability to discriminate in the interconnection of competitors' offerings. See, Section III.B, incorporated herein by reference.

4.

The Commission finds and concludes that during the trial period for MemoryCall℠, SBT used its monopoly control of the local service network to impede competition in the VMS market by denying MemoryCall℠ competitors appropriate and fair access to the local service network. See, Section III.C.1, incorporated herein by reference.

5.

The Commission finds and concludes that during the trial period for MemoryCall℠, SBT used its monopoly control of its local telephone service operations, including specifically but not limited to its monopoly service marketing and billing operations,

to impede competition in the VMS market. See, Section III.C.2, incorporated herein by reference.

6.

The Commission finds and concludes that substantial issues of predatory pricing and cross-subsidy have been raised with respect to MemoryCall℠ and that SBT has failed to show by reliable evidence that the price charged by it for MemoryCall℠ is a just and reasonable rate, free from predatory pricing and cross-subsidy. See, Section III.C.3, incorporated herein by reference.

7.

The Commission finds and concludes that SBT has the opportunity and incentive to use its monopoly control of the local service network and operations to impede competition in the VMS market. See, findings and conclusions numbers 2 through 6 herein, hereby incorporated by reference.

8.

The Commission finds and concludes that SBT has in fact used its monopoly control of the local service network and operations to impede competition in the VMS market. See, findings and conclusions numbers 4 through 6 herein, hereby incorporated by reference.

9.

The Commission finds and concludes that the regulatory policy it wishes to pursue, which policy it also finds and concludes is a fair, just and appropriate regulatory policy, is to promote the development of the intrastate VMS market to its efficient,

competitive extreme. See, Section IV, incorporated herein by reference.

10.

The Commission finds and concludes that SBT's opportunity and incentive to use its monopoly control of the local service network and operations to impede competition in the VMS market, and SBT's actual use thereof for that purpose, frustrates attainment of the Commission's regulatory policy of promoting development of the intrastate VMS market to its efficient, competitive extreme. The Commission further finds and concludes that SBT's opportunity and incentive to use, and actual use of its monopoly control of the local service network and operations to impede competition in the VMS market will continue unless effective regulatory controls are developed and implemented to preclude and/or deter such anticompetitive behavior.

11.

The Commission finds and concludes that in order to halt SBT's opportunity and incentive to use, and actual use of its monopoly control of the local service network and operations to impede competition in the VMS market, and to protect the development of a completely competitive VMS market (including protecting individual VMS competitors) until it can become self-regulating, it is proper to place SBT's trial offer of MemoryCall℠ on a temporary freeze until the appropriate regulatory controls can be developed and implemented to preclude and/or deter SBT's anticompetitive behavior in the VMS market.

12.

The Commission finds and concludes that SBT's opportunity and incentive to use, and actual use of its monopoly control of the local service network and operations to impede competition in the VMS market has caused and will continue to cause immediate and irreparable harm to development of a completely competitive VMS market and to individual VMS competitors.

13.

The Commission finds and concludes that any harm to SBT that might result from the temporary freeze of SBT's trial offer of MemoryCall℠, is outweighed by the immediate and irreparable harm SBT's uncontrolled presence in the VMS market causes to the development of a completely competitive VMS market and to individual VMS competitors.

14.

The Commission finds and concludes that protection of SBT's ratepayers, promotion of development of the VMS market to a stage of complete competition and protection of the state's telecommunication's infrastructure and economy requires that SBT's trial offer of MemoryCall℠ be temporarily frozen while appropriate regulatory controls are designed and implemented. The Commission further finds and concludes that such controls must be designed and implemented on a permanent basis until the VMS market reaches a stage of complete competition where it can self-regulate SBT's presence in the VMS market, notwithstanding SBT's opportunity and incentive to use, and actual use of its monopoly control of the

local service network and operations to impede competition in the VMS market.

IX.

ORDERING PARAGRAPHS

WHEREFORE, based on the findings and conclusions of fact, law and regulatory policy as stated and supported herein, it is

ORDERED, that SBT's authority to offer MemoryCall℠ service on a trial basis is hereby temporarily frozen, such that SBT's provision of MemoryCall℠ service is temporarily restricted to those customers who have actually subscribed to MemoryCall℠ service on or before the date of this Order.

ORDERED FURTHER, that SBT shall file a complete cost of service study, including all workpapers in support thereof, demonstrating that the price of MemoryCall℠ is just and reasonable.

ORDERED FURTHER, that the Commission shall design and implement regulatory controls in accordance with the discussion in Section V herein, at which time the temporary freeze of SBT's offering of MemoryCall℠ service shall be reexamined by the Commission.

ORDERED FURTHER, that the Commission shall apply the regulatory framework testified to by the Commission Staff in this case as the general means of regulating SBT's provision of MemoryCall℠ service.

ORDERED FURTHER, that in conjunction with applying the regulatory framework testified to by the Commission Staff in this case, the Commission shall develop a standard for determining when

the VMS market has reached a stage of complete competition, so that the Commission may entertain the prospect of fully deregulating SBT's provision of MemoryCall℠ service at the earliest appropriate juncture.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as the Commission may deem proper.

ORDERED FURTHER, that a motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

The above by order of the Commission in Administrative Session on May 21, 1991.

WILLIAM J. BUCKNER
EXECUTIVE SECRETARY

6-3-91
DATE

BOB DURDEN
CHAIRMAN

6/4/91
DATE